

GOVERNMENT OF THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENTS

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PUBLIC MEETING

+ + + + +

WEDNESDAY

MAY 7, 1997

+ + + + +

The public meeting was held in Room 220 South at 441 4th Street, N.W., Washington, D.C., at 3:15 p.m., Susan Morgan Hinton, Chairperson, presiding.

PRESENT:

SUSAN MORGAN HINTON	Chairperson
LAURA M. RICHARDS	Vice Chairperson
MAYBELLE TAYLOR BENNETT	Member
ANGEL F. CLARENS	Member
SHEILA CROSS REID	Member

STAFF PRESENT:

MADELIENE H. DOBBINS
REGINALD LYONS
TRACEY ROSE

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1 P-R-O-C-E-E-D-I-N-G-S

2 (3:13 p.m.)

3 CHAIRMAN HINTON: We'll open or continue
4 the meeting of this morning. Let's take a five-
5 minute break.

6 (Whereupon, the foregoing matter went
7 off the record at 3:13 p.m. and went
8 back on the record at 3:19 p.m.)

9 MS. DOBBINS: Good morning, Madam
10 Chairman, members of the Board. This is the
11 continuation of the public meeting from this
12 morning, and you have reconvened to consider cases
13 that you deferred until this afternoon, and if we
14 can move on into the agenda, the first item to be
15 considered this afternoon was item C on page 2, if
16 we go in the order they come on the agenda.

17 That would be 16218, the application of
18 H. Nevins and Sherry K. -- I think this is Mones,
19 pursuant to 11 DCMR 3107.2, for a variance from the
20 rear yard requirements (Subsection 404.1) for an
21 addition to a detached single-family dwelling in an
22 R-1-A District at premises 2208 Foxboro Place, N.W.
23 This is Square 1341, Lot 41. It was heard March 19,
24 1997.

25 Board members present: Ms. Hinton, Ms.
26 Richards, Ms. Sheila Reid and Mr. Franklin.

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1 On April 9, 1997, the Board deferred a
2 decision in the case to allow the applicant to
3 submit a revised site plan with more dimensions, and
4 to receive from the Zoning Administrator a
5 memorandum regarding lot occupancy and the deck.
6 The applicant's submission was due by April 23,
7 1997. The Zoning Administrator's memorandum was due
8 by April 30, 1997.

9 You did have those items in your packet.
10 This application is before you for a decision.

11 CHAIRMAN HINTON: Thank you. Do we have
12 a motion on the case? All right, anybody?

13 MS. DOBBINS: Madam Chairman, in
14 relation to this case, you have just -- we have just
15 received requests. There's a request for a waiver
16 from the April 23, 1997 due date for submission of a
17 site plan with more dimensions, and this is from the
18 applicant, and it does have an additional -- It has
19 a site plan that shows how everything is laid out on
20 the site.

21 The Board would have to waive the
22 deadline to receive this information.

23 MS. RICHARDS: I'm willing to waive the
24 requirement. I'm wondering how it's going to affect
25 our ability to decide the case today. I think we
26 did all -- I'm willing to entertain other views.

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1 MR. CLARENS: Let me first say that
2 between this morning and this afternoon in my hour I
3 read and became familiar with this case, and I'm
4 ready and willing to participate in the case.

5 CHAIRMAN HINTON: Very good. Thank you.
6 We have no -- There's no reason given for the
7 information not being timely filed. However, it's a
8 site plan. I think it won't harm us in making our
9 decision and may help us. So I'm inclined to let it
10 come into the record. I don't hear any objection to
11 that.

12 MS. DOBBINS: It's been ruled, it will
13 be received.

14 CHAIRMAN HINTON: Okay. Let me try this
15 again. Do I have a motion on the case?

16 MS. REID: I'll move approval.

17 CHAIRMAN HINTON: Is there a second?
18 Okay. We have no second. Do we have a different
19 motion?

20 MR. CLARENS: I move denial.

21 CHAIRMAN HINTON: I will second that.
22 Would you like to put some reasons forward?

23 MR. CLARENS: Yes. This is a case that
24 requires proof by the applicant of the variance
25 test, which is a tripartite test, producing a
26 practical difficulty, and the lack of adverse, in

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1 fact, and the issue of the intent of the zoning
2 regulations.

3 I feel that there is uniqueness to this
4 property, both in terms of its topography and in
5 terms of the configuration and in terms of the ten-
6 foot setback from the front property line, and these
7 items establish a uniqueness, that that uniqueness
8 might be linked to a practical difficulty in
9 allowing for a deck and a screened porch is somewhat
10 questionable, given the presence of the garage at
11 the side of the property, the level of the roof of
12 which is at or near the level of the main floor of
13 the house.

14 I have not a lot of a problem with
15 adverse. In fact, I think that that test is met. I
16 have a difficulty in finding that the burden of
17 proof has been met on the third item, which is the
18 regulations, which is to allow for sufficient space
19 between buildings for the orderly development of the
20 land in a different zone category and to establish
21 proper space in between structures.

22 I think that the screened porch projects
23 significantly into the rear yard in a way that is
24 hard to justify and hard to find in agreement with
25 the intent of the zoning regulation, which is to
26 allow that kind of a spacing.

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1 On the basis of that and that I don't
2 think that it meets the -- There is no nexus between
3 the uniqueness and the practical difficulty and that
4 there is an alternative way of doing it which will
5 be done as a matter of right, and that the intent
6 has not been met. I would recommend denial.

7 CHAIRMAN HINTON: I would agree with
8 what you said. In addition, I struggled with the
9 first two tests of a variance. I find the lot to be
10 not unlike many lots that are at the end of a cul-
11 de-sac. It's pretty much the shape that is usually
12 put in, and its shallowness is usually designed to
13 allow the greatest number of lots along the street.

14 If the lot was deeper, there would be
15 fewer lots, and this is why I get into the problem
16 with the variance. If the lot was deeper, there
17 would be fewer lots. Therefore, they wouldn't --
18 they could have a screened porch without going into
19 the rear yard, because they would have a bigger
20 yard, and the intent of the zoning regulations would
21 be more clearly met in the balance between the built
22 environment and the open environment; but because,
23 when lots are subdivided, they are squeezed to the
24 absolute minimum. That has the effect of
25 making what is built in the building area as part of
26 the house near to the lot occupancy and nearly

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1 covering most of what is available outside of the
2 required yards.

3 So I don't really find a unique
4 condition that is causing a practical difficulty in
5 the reasonable use of the lot. It's a single-family
6 lot. There is a pretty substantial single-family
7 home located on it, and the request to have a
8 screened porch -- I don't feel that that's required
9 in order for it to be a reasonable use of the
10 property.

11 So I have dilemmas in addition to the
12 one that we share. Do you have anything to add?

13 MS. REID: Very little. I agree. I
14 think that the amount of relief, plus it is rather
15 excessive in that it does tend to take up the
16 majority of the rear yard space, in addition to the
17 fact that there are other alternatives other than
18 the one that is put before us for relief or for
19 achieving a porch.

20 So I think that, although you could say
21 that the first test -- it is unique -- there is
22 certainly not a great deal of adverse impact, but I
23 do feel that the applicant does -- to grant it would
24 not be in -- would be a -- cause a detriment to the
25 regulations, and I don't think that it was the
26 intent to allow that kind of intrusion into a rear

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1 yard.

2 MS. RICHARDS: I would -- my opposing
3 view, I think, for the backyard. I would accept the
4 burden from the homeowner to the developer on the
5 issue of like cul-de-sac. This is not unusual for a
6 cul-de-sac housing that is small, but it's also --
7 It is squeezed onto the lot, and do you blame the --
8 These were approved when the land was approved.
9 Everyone knew that these were big houses on a small
10 lot, and I'm not sure that the person who comes
11 along and buys and occupies should sort of like then
12 be maybe foreclosed from the normal kind of desire
13 to improve and personalize one's property.

14 If there were questions of adverse
15 impact, there would be no question that the relief
16 could not be granted, but since this was a case
17 where there was no adverse impact and where this was
18 going to be a screened porch, I felt that the need
19 to sort of preserve kind of the open space and the
20 air was not as great as if it had been an enclosed
21 space.

22 So with that concern, no adverse impact,
23 this would be a house squeezed onto an oddly shaped
24 lot, I felt that the relief was warranted.

25 CHAIRMAN HINTON: Very good. Thank you.
26 Let me call the question. All those in favor, aye.

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1 Opposed?

2 MR. LYONS: Mr. Franklin would cast an
3 absentee vote in opposition to the motion. Staff
4 would then record the vote as being three to two to
5 deny the application. Mr. Clarens, Ms. Hinton, and
6 Ms. Reid to deny; Ms. Richards opposed to the
7 motion; Mr. Franklin opposed to the motion by
8 absentee vote.

9 MS. DOBBINS: The next item on the
10 agenda -- the Board will move to Roman numeral III.
11 Motions. The first motion would be 16035.

12 This is the request of Maybelle Taylor
13 Bennett pursuant to Subsection 3332.7 of the Board's
14 Rules to move the Board on its own motion to
15 reconsider the Order dated March 18, 1997 in the
16 application of David A. and Robert Schaefer,
17 pursuant to 11 DCMR 3108.1, for a special exception
18 under Subsection 203.10 to establish a home
19 occupation that is beyond the scope of the Zoning
20 Regulations as a meeting location for business and
21 social events in an R-1-B District at 5001 16th
22 Street, N.W. (Square 2713, Lot 23.)

23 It was heard May 10, 1995, decided June
24 7th and July 12, 1995.

25 The Board granted the application by a
26 vote of 3 to 2. Mr. Clarens, Ms. Hinton, Ms.

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1 Bennett to grant; Mr. Ellis and Ms. Richards opposed
2 to the motion.

3 On March 12, 1997, the Board deferred
4 this matter following its action to reconsider the
5 decision by a vote of 3-1. Ms. Bennett, Ms. Hinton
6 and Ms. Richards to grant; Mr. Clarens opposed to
7 the motion by absentee vote; Ms. Reid, not present,
8 not voting, not having heard the case.

9 On April 9, 1997 the Board deferred
10 entering a new decision to allow Ms. Bennett to be
11 present.

12 The final date of the order, March 18,
13 1997, and there is a copy of the final order. In
14 addition, in your packet you received a memo from
15 Ms. Bennett and information from the applicant's
16 attorney. Both of these were filed early in 1995.
17 At that time, the record had not been reopened for
18 reconsideration request, and they are now being
19 received into the record, since that request is
20 before the Board.

21 This is before the Board for action.

22 CHAIRMAN HINTON: I am searching for my
23 paperwork on this. I would like to find it. All
24 right.

25 Ms. Bennett, if I can ask you to get our
26 discussion started.

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1 MS. BENNETT: Sure. Thank you, Madam
2 Chair.

3 We heard this case back in 1995, as the
4 Madam Director just summarized for us. At that
5 time, I think all of us were uncomfortable with our
6 moving forward without having some kind of policy
7 determination made by the Zoning Commission.

8 We went ahead and took the vote, and I
9 on August 7th approached the Commission, gave them a
10 briefing, as well as -- and had someone also from
11 the Office of Zoning staff join me in characterizing
12 the issues in the case, to find out how the
13 Commission at that point felt about the action that
14 was taken.

15 The Commission at that time also
16 indicated that they -- after hearing what we had to
17 say, indicated that they had no interest in pursuing
18 this in a sua sponte manner, but that they felt that
19 this was the kind of issue where the Board of Zoning
20 Adjustment made an interpretation regarding the home
21 occupation in this case which was not anticipated by
22 the Zoning Commission, and that I was to come back
23 as the Commission member and communicate that to
24 you.

25 I did so, and I also put together a memo
26 dated August 30th, because I had some concerns,

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1 especially since I was one of the people who voted
2 in favor.

3 The concerns had to do with how we
4 informed the applicant, that the discussion was
5 taking place especially if the record were closed,
6 how we secured from the Zoning Commission in an
7 instance like this, in the absence of pursuing a sua
8 sponte course of action. Then how do we protect the
9 Commission's right to establish a new policy or
10 modify existing policy as it regards what is or is
11 not permissible as a home occupation without
12 unfairly impacting our applicant.

13 I was made aware that, first, the
14 applicant would be informed, should be brought to
15 the Commission, that the Commission, because it did
16 not want to undergo sua sponte review, would prefer
17 that I return to this Board and say -- and finally,
18 that the concern about how do you not unfairly -- or
19 how do you avoid unfairly impacting an applicant
20 could be dealt with through Section 3332.9 of the
21 Rules, which states that neither the filing of nor
22 the granting of a motion for reconsideration or
23 rehearing shall automatically stay the effect of a
24 final decision made unless the Board orders
25 otherwise.

26 So it would seem to me that we need a --

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1 the response that we have in the packet that was
2 given to us from counsel for the applicant is dated
3 September 5, 1995, and I was just asking Ms. Dobbins
4 whether or not we had had any response from the
5 applicant.

6 As I understood it, if this course of
7 action takes place, we need to give the applicant an
8 opportunity to respond, and that that would be the
9 next course of action, and then we could go ahead
10 and make a decision on the heart of the
11 reconsideration.

MS. DOBBINS: In your
12 memorandum, you were concerned about the applicant
13 having opportunity to respond, and as was the
14 applicant in their letter that came before the
15 Board.

16 The only way that the applicant would
17 have an opportunity to respond is that they
18 understand what your discussion is related to why
19 you are reconsidering. So there would actually be
20 no opportunity for them to respond until they
21 understand the reasoning behind the Board, if the
22 Board reconsiders, and then the Board would have to
23 then provide them an opportunity to respond.

24 MS. BENNETT: So then maybe what I
25 should do at this point is to dig back in my memory
26 and get more specific.

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1 When I brought this to the Commission's
2 attention, the concern was that -- as we
3 anticipated, I believe, in our discussion, was that
4 the intention was for there to be every opportunity
5 for an individual to practice his or her profession
6 within the confines of their home, providing that
7 certain things did not happen: (1) that the
8 character of the neighborhood should not change as a
9 result; that the level of activity did not become so
10 intense that you begin to adversely effect your
11 neighbors; that the appearance on the outside of the
12 home did not depart from the general character of
13 the neighborhood.

14 There are a series of things that are
15 built into the home occupation provisions that were
16 built in because we wanted to provide some
17 opportunity for folks to make money without
18 disturbing the neighborhood, but to allow them to
19 pursue their profession or their craft or their
20 skill and so on.

21 We had a lengthy discussion, if you
22 recall, as to what extent that meant that you could
23 use the house itself outside of being in a way that
24 supports your professional activity or your craft or
25 whatever, but that you could use your house as its
26 square footage itself as something you could rent

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1 out, and we had a lively set of discussions about
2 that, as I recall.

3 When I brought that to the Commission's
4 attention, the response was, well, for certain that
5 the rental of the space itself had not been
6 anticipated, and that it more closely approximated a
7 public hall kind of function, and that, if anything,
8 you know, this kind of application should not,
9 therefore, go through based on the extant
10 regulations; and if, in fact, it were going to go
11 through at all, there needs to be some step taken by
12 the Commission to take another look at those
13 regulations, that there needs to be some additional
14 review, because I don't think this had come before
15 us at all, and I was sitting when we developed the
16 home occupations regulations.

17 So that is not to say that, forever and
18 always, Mr. Schaefer may not be able to do this
19 thing, but it is to say that under the home
20 occupations regulations as they exist now, the
21 intention was not to allow this kind of a case to be
22 approved.

23 There may be some opportunity for the
24 Zoning Commission to take another look at them with
25 this case in mind. You know what I'm saying? So
26 that we begin to look at, well, how appropriate is

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1 it at all to entertain the notion of being able to
2 use the space as opposed to -- as a home occupation
3 as opposed to focusing on the individuals in the
4 family who happen to want to practice their
5 professional craft.

6 So those are the -- That was the
7 consensus, as I understood it.

8 MR. CLARENS: At the beginning I didn't
9 understand why this was being brought back for
10 reconsideration by the Board, and I'm glad that you
11 wrote the memo and that you have explained your
12 concerns, which I share.

13 CHAIRMAN HINTON: Can you speak up a
14 little?

15 MR. CLARENS: I don't need to repeat all
16 that. So I concur with you. My concern is with due
17 process to the applicant, who came in good faith, as
18 you point out, who had a hearing, and then we took a
19 vote and we approved this application after a long
20 and lively debate, as you characterize.

21 I concur with the same -- I have the
22 same concerns. I am intrigued with the notion
23 because of what it does for a certain type of
24 property in cities such as the District of Columbia,
25 properties that at one point in their lifespan were
26 appropriately sized but that, given the lifestyle of

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1 city residents today and the changes in the
2 neighborhoods where they are, have ceased to have
3 the same type of satisfying the needs of the people.

4 So I was intrigued, because this gave
5 new life to -- the possibility of new life and
6 quite a creative way of giving new life to old
7 houses, which have are handsome and add
8 significantly to the nature of the cities -- of our
9 cities.

10 So in view of that, I was intrigued by
11 this notion, but I concur with you that it has some
12 problems. My big problem in bringing up at this
13 point, especially when this is a two-year time span
14 that we have approved this special exception, which
15 I assume started running from the March date in
16 which the final order was actually issued -- My
17 concern is that what the Board needs is
18 clarification from the Zoning Commission such as you
19 have begin to suggest, that this is in fact a
20 meeting hall and not a -- you know, and not a home
21 occupation for subsequent decisions of this Board;
22 but I am hard pressed to understand how we are going
23 to go back, having made the decision that, in fact,
24 an applicant -- and that applicant have acted in
25 good faith, and go back and change our minds at this
26 point retroactively and affect the order that has

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1 been issued.

2 I would feel much more comfortable if
3 the Zoning Commission would then give some
4 clarifications and guidelines to the Board in the
5 regulations as to what the limits are, so that this
6 kind of possible confusion by Board members in the
7 interpretation of the regulation can be clarified in
8 the future, including this case, which is going to
9 have to come back to the Board within a year and a
10 half, because it expires, you know, in two years.

11 So it's going to be here around the
12 corner in a year or year and a half. It's going to
13 be back here before this Board, and that's the time
14 where the clarification might say, well, it was --
15 you know, we have now clarification from the Zoning
16 Commission; we now have an understanding of the
17 limits of that and, therefore, on the basis of that,
18 you do not meet the burden of proof for a special
19 exception, and we cannot continue the burden of
20 proof at that time at the next hearing. But I don't
21 see how we can go back at this point. That's --

22 MS. BENNETT: Well, you see, there is a
23 way to go back, and that is maybe not the Board
24 going back but the Zoning Commission can change your
25 mind for you. What we were trying to do -- We were
26 trying to do something short of that.

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1 MR. CLARENS: Well, but the Zoning
2 Commission can do that. I think that, short of
3 that, meaning what? The Board then changes its
4 mind?

5 MS. BENNETT: Yes. We were in error.
6 One of the ways you justify reconsideration is if
7 you understand subsequent to having made the
8 decision -- and I'm hoping staff will correct me --
9 that you made an error. I mean, that's one of the
10 most common ways to do it.

11 MR. CLARENS: Yes, but that's on the
12 basis of new information before the Board. That is
13 not --

14 MS. BENNETT: No, no.

15 MS. DOBBINS: That's not true. The
16 error has to do with the reconsideration. New
17 information has to do with the rehearing.

18 MS. RICHARDS: I'd like to be heard on
19 this. As somebody who voted against this order, you
20 know, because I thought it was sort of facially
21 outside the scope of the home improvement -- home
22 occupation rules, I fail to understand the hand
23 wringing, now that the legal error has been spelled
24 out by the Zoning Commission, and I would hope it's
25 readily apparent to everybody.

26 I don't understand the kind of lack of

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1 desire to go ahead and correct the error
2 expeditiously. Now if the applicant had gone out
3 and built a building on the strength of an erroneous
4 order which he had no reason to think was going to
5 be appealed, you might have a better case, but this
6 was a two-year special exception.

7 If your concern is for the applicant's
8 rights, then you can take reconsideration now and
9 simply say that, as of now, it will not be -- it
10 will be allowed to expire, but it's my -- and the
11 applicant has really had the benefit of a good 18
12 months of, you know, benefitting from this. He's
13 not a loser.

14 MR. CLARENS: I would have no problem
15 having a reconsideration, discussing the merits of
16 the case, and then moving forward with what you have
17 just proposed -- that is, to let the order expire
18 and notify the applicant that the Board will not
19 renew the special exception.

20 CHAIRMAN HINTON: If I could, it's my
21 understanding that the order was just recently
22 issued, March 18th. The applicant had no benefit of
23 anything other than waiting for two years for us to
24 put in writing what our decision was.

25 MS. DOBBINS: Which means they really
26 couldn't rely on anything until ten days beyond

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1 March 18, 1997, and the reconsideration request was
2 put in during that period of time.

3 MS. RICHARDS: So there is no harm to
4 the applicant by simply reconsidering at this time.
5 I'm not sure what further discussion we can have on
6 the merits, the merits employed, explicated at a
7 couple of meetings now, and that, you know, a
8 hearing, I think, as everyone's memory has been
9 refreshed. You know, it's a meeting hall.

10 CHAIRMAN HINTON: This is difficult.
11 We've never been through anything like this as long
12 as I've been on the Board, and I don't know -- As
13 long as some other people have been on the Board,
14 which is a lot longer than me.

15 I share your concern, Mr. Clarens, that
16 probably no matter where we go, the applicant hasn't
17 been well served. Having to wait two years for a
18 written order of a decision is poor performance,
19 either way.

20 Having waited two years to find that
21 that decision is coming into question is really
22 unfortunate, and I guess I share your concern that
23 the Zoning Commission has the authority to sua
24 sponte review any decision that the Board makes. If
25 it is the determination of the Zoning Commission
26 that this was the wrong decision, they have that

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1 right and that authority.

2 I believe that the Board's decision was
3 based on the information that the Board had at the
4 time of the hearing, which was lacking any
5 interpretation from the Zoning Commission as to what
6 was in the regulations. We based our decision on
7 the regulations and the facts of the hearing, and
8 the regulations, the way they were written and the
9 way that we read them and understood them.

10 Now I think it's highly unusual to then
11 reconsider that decision based on additional input
12 from the Zoning Commission in further defining or
13 explaining regulation. So I share your concern, Mr.
14 Clarens. I really do.

15 On the other hand -- this probably isn't
16 going to help anybody -- the case was difficult, and
17 it is clearly -- Well, it's a close case, and it's -
18 - You know, when you have to make a decision, you
19 have to put it on one side or the other. We don't
20 have the option of saying it's too close to call.
21 We have to call it.

22 I think we did the best we could with
23 the facts that we had, and I think it's wrong for
24 this Board to now go back on the same exact facts
25 and the same exact regulations and say we see it
26 differently.

MS. RICHARDS: Madam

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1 Chairperson, given your views and those of Mr.
2 Clarens, I'd like to move that the Board invite the
3 Commission take sua sponte review.

4 MR. CLARENS: Is that a motion?

5 MS. RICHARDS: Yes, it was.

6 MR. CLARENS: Yes, I would second that.

7 CHAIRMAN HINTON: Can we move that?

8 MS. RICHARDS: It's a proper motion.

9 It's within the scope of our regulations.

10 CHAIRMAN HINTON: No, I don't think it's
11 -- No, I don't really -- I have to tell you, I --

12 MS. RICHARDS: Sua Sponte review has to
13 be done by the Commission on its own -- on its own,
14 as I understood it.

15 MS. DOBBINS: But also the Board took
16 action to reconsider. So you've got to undo that or
17 -- I mean, you can't just go over that. You already
18 took action to reconsider, and then defer the
19 discussion and all of that until a later time.

20 CHAIRMAN HINTON: Well, okay. This
21 discussion that we're having now is in the context
22 of the reconsideration? Okay. So haven't we said
23 that we think that a reconsideration by this Board
24 would be improper based on --

25 MS. BENNETT: Well, some of you said
26 that.

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1 MS. DOBBINS: There was a vote to
2 reconsider.

3 CHAIRMAN HINTON: Right.

4 MS. DOBBINS: Okay. If you're not going
5 to reconsider --

6 MS. BENNETT: So now we are in the
7 process of considering again.

8 MS. DOBBINS: Yes. You are supposed at
9 this point to make a decision on this application,
10 to either grant the application or to deny the
11 application. You have already voted to reconsider.
12 So the Sua sponte is not an issue right now at all.

13 MS. BENNETT: Until we make a decision
14 again.

15 CHAIRMAN HINTON: Okay. Mr. Clarens,
16 you have a motion?

17 MR. CLARENS: Well, I voted against the
18 motion of reconsideration for the same reasons that
19 you have now stated very clearly, that there is
20 nothing new before this Board, that the Board had
21 all these facts, that the Board accessed all the
22 facts. It took a decision. There was a majority
23 decision. It has rendered that decision and now
24 issued an order, and then now the Board is
25 reconsidering, meaning its changing its mind about
26 what they have decided.

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1 I find that intrinsically unfair to the
2 system. I find that another board, another body
3 that has jurisdiction or power over us to sua sponte
4 review, can do that, and I think that they are
5 welcome to do that, and that's why I voted against
6 the reconsideration.

7 So that's the whole issue, but now let's
8 say that, well, originally I lost that vote, and so
9 the Board is now reconsidering. My sense is that
10 there is nothing new except the change in mind on
11 one of the members that voted in favor of this
12 application, that she believes that she erred in
13 making that thing. If that's the case, she can
14 change her mind, I guess. That's where we are.

15 MS. RICHARDS: Wait a minute. Let's be
16 quite clear, that a simple change of mind is not a
17 sufficient basis to reconsider. That would be
18 arbitrary and capricious. A Board member has been
19 apprised and has become persuaded that she and the
20 majority committed an error of law and allowed this
21 Board to approve ultra vires action.

22 CHAIRMAN HINTON: Okay. So these are
23 the regulations that we have, 1332.4: A motion for
24 reconsideration shall state specifically the
25 respects in which the final decision is claimed to
26 be erroneous, the grounds of the motion, and the

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1 relief sought.

2 Now it's clear to me what Ms. Bennett
3 has said, and please correct me if I didn't get this
4 right, that you believe the decision was erroneous
5 based on the Board's interpretation of the
6 regulation of the home occupation extending to the
7 rental of the property for public hall type
8 activities.

9 MS. BENNETT: Right.

10 CHAIRMAN HINTON: Okay. Then we have
11 another regulation that says -- This is 3332.6: No
12 request for rehearing shall be considered by the
13 Board unless new evidence is submitted which could
14 not reasonably have been presented at the original
15 hearing.

16 Now I think we're not talking about
17 rehearing. We are simply talking about
18 reconsideration based on one Board member's belief
19 that an error was made in the interpretation of the
20 regs. Is that right? Okay.

21 Based on that, we voted to reconsider.
22 So we're now at the point where we're reconsidering
23 the decision. Okay.

24 MS. BENNETT: Now I see us -- Let me
25 just walk us through this before we do anything, if
26 I may.

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1 It seems to me that we have four people
2 participating, two who feel comfortable denying this
3 application perhaps and two who do not. Whatever
4 motion is made will fail for a majority -- for lack
5 of a majority, which keeps us exactly where we are.

6 If you think down the pike a little bit,
7 you got a 3-2 vote that stands. I think under those
8 circumstances, there is no need to invite the Zoning
9 Commission to do a sua sponte. The Zoning
10 Commission member can go back to the Commission and
11 indicate what has happened again, and leave it up to
12 the Zoning Commission to do whatever the Zoning
13 Commission is going to do, given its sentiments.

14 So I just wanted you to think about
15 that. That is one scenario.

16 MR. CLARENS: Let me ask you then the
17 other scenario. Let's say, for example, that the
18 Board was to reconsider and deny the application,
19 because we're either going to approve the
20 application or deny the application. That's what is
21 in front of us.

22 We deny the application. What does that
23 mean?

24 MS. BENNETT: It means, as far as I
25 know, that the --

26 MR. CLARENS: Renders the previous order

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1 null.

2 MS. BENNETT: -- the gentleman is not
3 able to go downtown and get a home occupation
4 certificate for the use of his home in the manner
5 that he's been doing or had the opportunity to do
6 anyhow.

7 MR. CLARENS: It renders the previous
8 order null and void.

9 MS. BENNETT: Right.

10 MR. CLARENS: Immediately, or when the
11 new order --

12 MS. BENNETT: When the new order becomes
13 effective.

14 MR. CLARENS: When the new order becomes
15 effective?

16 MS. BENNETT: Yes. Right?

17 MS. DOBBINS: Yes.

18 MS. BENNETT: Then we have to have
19 another order written.

20 MS. DOBBINS: Yes, you do.

21 MR. CLARENS: Which is going to take two
22 years.

23 MS. RICHARDS: We have a new expedited
24 order, as you know. Where are you going with this?

25 MR. CLARENS: I am concerned -- I'm
26 trying to figure out the scenario.

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1 MS. BENNETT: He's also thinking in the
2 future months.

3 CHAIRMAN HINTON: Okay. We have an
4 order that's standing. Right? We have a decision
5 and an order. So --

6 MS. DOBBINS: You have voted to
7 reconsider. So you kind of have -- You're kind of
8 in between at this point.

9 CHAIRMAN HINTON: Well, but if we voted
10 to reconsider --

11 MS. DOBBINS: Your decision. Your
12 decision was to grant, and you've voted to
13 reconsider that.

14 MR. CLARENS: My sense, Ms. Bennett, is
15 that unless you feel that it was a terrible error on
16 the part of the Board to allow this to happen, and
17 that it's going to have grave consequences, that
18 doesn't it serve the interest of the city better if
19 we let the order stand as it is, even though you
20 might think that there was an error in
21 interpretation of the regulations, as the Zoning
22 Commissioners have seemed to concur with you as per
23 your memorandum, and then get clarification from the
24 Zoning Commission to the BZA as to what, in fact,
25 are the limits of home occupations so that the Board
26 knows clearly what it is, notify the applicant that

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1 that is in fact the case, and that he need not apply
2 for a reissuance of the special exception because
3 under the present -- he can apply under different
4 circumstances, but as he applied the first time
5 around, that the Board will not consider -- that
6 that's not what the Board will consider.

7 MS. BENNETT; And let me just say, Mr.
8 Clarens, I resonate to your intent there. Our
9 instincts are not that different, but it is my
10 understanding that the Board looks to the
11 regulations, not to what's best for the city. We
12 don't get that global.

13 If you were sitting on the Zoning
14 Commission, you get to get that global, but right
15 now we have to be guided by the zoning regulations.
16 I think that's the sticker. That's the thing that
17 had us all engaged in lively debate before.

18 MR. CLARENS: And again.

19 MS. BENNETT: And again, you know. It
20 may, in fact, for argument's sake, be something that
21 inures to the benefit of the city. It may, in fact,
22 be a major problem. I don't know how many nice, big
23 houses there are in quiet residential neighborhoods
24 which people may find useful to rent out to wedding
25 parties and the like on a once or twice-a-month
26 basis year round.

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1 It scares me to think of it. I have a
2 feeling this town has quite a few nice, old, bit
3 houses with lawn and such, and not everybody is
4 going to be welcoming of such activity, if it were
5 to proliferate throughout the city where the same
6 kinds of conditions exist.

7 You know, the ANC was in favor, if you
8 recall. I don't know that we had much, if any,
9 opposition. We may have had some.

10 MR. CLARENS: We had opposition, but it
11 was on the other side of Mill Valley Road or
12 whatever it was.

13 MS. BENNETT: Yes, and so, see, I think,
14 while we may not -- while the danger may not lurk or
15 may not be in that whole bunches of folk are going
16 to rush up to try to get the same kind of permission
17 to do the same kind of thing all of a sudden, I
18 think we could potentially be creating a problem.
19 You know what I'm saying?

20 Now your point is well taken. Depending
21 on how long it takes to crank out this order, you
22 know -- if you just let it ride, I mean, the man may
23 have, you know, a handful of months where he's able
24 to actually do this before he comes back and the
25 like; but you see, I don't want to take that chance,
26 and that's why I called for our reconsideration of

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1 this.

2 MS. RICHARDS: I would also like to say
3 that I think that what you've proposed impermissibly
4 combines legislative and adjudicatory functions. I
5 don't think we can enter into policy or prospective
6 rulemaking. I mean, let's just decide this matter
7 as an adjudicatory case.

8 CHAIRMAN HINTON: I have a question. We
9 have voted to reconsider. If as a result of that
10 reconsideration discussion which we've having now,
11 the Board cannot pass a motion either way, what's
12 the status of the former decision?

13 MS. BENNETT: It stands, as I understand
14 it.

15 MS. DOBBINS: No. I think you would
16 have to dispose of the reconsideration some kind of
17 way. You would have to decide to put the order back
18 in place. It doesn't just stand, because you have
19 voted to reconsider that decision.

20 MS. BENNETT: Oh, so then you would need
21 another motion to reinstitute.

22 MS. DOBBINS: You have -- Yes.

23 MS. BENNETT: But you would still end up
24 with a 2-2 vote.

25 MR. CLARENS: We have a fifth member of
26 the Board that might be able to break the ties. We

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1 can ask Ms. Reid to read the record and participate
2 in the new decision, because it is a new decision.

3 MS. DOBBINS: It is a new decision.
4 It's a new decision, because when you voted to
5 reconsider, you voted saying you had made an error.

6 MS. RICHARDS: Well, I think we've said
7 there was some potential. It was worthwhile
8 exploring to see whether we made an error.

9 MS. DOBBINS: No. When you vote to
10 reconsider, you're saying you made an error.

11 MS. RICHARDS: Probable cause for error.

12 MS. DOBBINS: No.

13 CHAIRMAN HINTON: If you vote to
14 reconsider, you're not discussing the substance of
15 the case.

16 MS. DOBBINS: Typically, that you
17 typically do it all at once. You just chose to
18 postpone the discussion. It's not easy, but --

19 MR. CLARENS: It's before the Board. WE
20 need to make a decision. We can either take a vote
21 now and see if, in fact, we have a deadlock, in
22 which case then we would invite Ms. Reid to read the
23 record and participate, or maybe, by any chance, the
24 vote might be in one favor or another, you know.
25 You never know. Ms. Richards might change her mind.

26 So in view of that, that's what I would

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1 recommend, that we take a vote and see where it
2 comes out, and then go from there.

3 MS. RICHARDS: I would move to deny the
4 application.

5 MS. BENNETT: I would second.

6 CHAIRMAN HINTON: All those in favor?
7 Opposed? Okay. That motion fails.

8 MR. CLARENS: Well, there is no point in
9 making a counter-motion. A counter-motion would be
10 to approve, and I guess it's going to have the same
11 result.

12 MS. DOBBINS: At this point Ms. Reid
13 will get the record.

14 MR. CLARENS: We can schedule this for
15 sometime in June, because otherwise you might end up
16 with the same problem.

17 MS. DOBBINS: Unless the Board needs to
18 do it another time, your June meeting is -- I think
19 it's the 4th or the 5th of June. Would the Board
20 want to consider a special meeting in May, the last
21 Wednesday in May? Today is the 7th.

22 CHAIRMAN HINTON: What date is available
23 in May?

24 MS. DOBBINS: The only reason I say May,
25 it's because, depending on the Board's decision and
26 how the votes are taken, we would have to get the

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1 order out in a hurry to not have to go through the
2 exceptions process.

3 CHAIRMAN HINTON: What's late in May?

4 MS. DOBBINS: The 28th is your last
5 Wednesday in May.

6 CHAIRMAN HINTON: May 28th, and we're
7 currently not scheduled to meet?

8 MS. DOBBINS: You're not scheduled to
9 meet, no.

10 CHAIRMAN HINTON: So we could have a
11 special public meeting starting in the morning.

12 MS. BENNETT: I can't do morning.

13 CHAIRMAN HINTON: Are you available on
14 the 28th in the morning?

15 MS. BENNETT: I could do it in the
16 afternoon or on another day.

17 CHAIRMAN HINTON: But not the morning?

18 MS. BENNETT: But Wednesday is not going
19 to be good for me.

20 CHAIRMAN HINTON: Okay, but the
21 afternoon at two o'clock, be available at two
22 o'clock on the 28th?

23 MS. BENNETT: You don't have to do
24 Wednesdays.

25 MS. RICHARDS: We could always vote by
26 proxy, you know.

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1 MS. BENNETT: No, not this one. You
2 don't want to vote by proxy.

3 MS. RICHARDS: Well, everybody's views
4 are already on the record.

5 CHAIRMAN HINTON: Let's schedule it for
6 the 28th at two o'clock in the afternoon. It's a
7 special meeting.

8 What's our next case?

9 MS. DOBBINS: The Board was to look at
10 15301 during lunch to see if there was enough of a
11 record available to proceed with that one, and I
12 don't know what the Board came up with. That's the
13 W.C. and A.N. Miller project.

14 MR. CLARENS: Madam Chairperson, I did
15 review the record available. I think that -- I
16 don't think -- My understanding is that that's not
17 100 percent of a record.

18 MS. DOBBINS: No, it is not.

19 MR. CLARENS: So we are back where we
20 started in this case. I still believe that the
21 simplicity of what has been asked is, in my mind,
22 you know, there's no possible -- even if the entire
23 record has not been reviewed, that the record that
24 has been reviewed would support a granting of this
25 request for consideration, and I would be ready to
26 move, if that would be appropriate from a procedural

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1 point of view.

2 MS. DOBBINS: Well, let me just read
3 this section of the rules to you. "No member shall
4 vote on any post-hearing motion unless the member
5 participated in and voted on the original decision
6 or the member read the transcript of the hearing and
7 reviewed the record." That's the specific text of
8 the regs.

9 MR. CLARENS; So if we were to interpret
10 that the way we're interpreting things this day, we
11 would say that, obviously, we need to read the
12 entire record -- the entire transcript.

13 CHAIRMAN HINTON: The entire record.

14 MS. DOBBINS: At best, it's generally
15 the transcript associated with the hearing itself,
16 and then you should have an opportunity to look
17 through and review the rest of the record, the
18 actual physical documents in the record of the case.
19 We've not been able to have that available for you
20 yet.

21 MR. CLARENS: So as Director of Zoning,
22 you feel uncomfortable with the Board proceeding on
23 this?

24 MS. DOBBINS: I do. Yes, I do.

25 MR. CLARENS: Then in that case, we
26 should, Madam Chairperson, postpone then until we

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1 can get the entire record and review it.

2 CHAIRMAN HINTON: We will do that.

3 MS. DOBBINS: Okay. The next item would
4 be on page 5 of the agenda, Item C, 15546. This is
5 a request from the applicant dated March 25, 1997.
6 This is for a waiver of the six-month period to file
7 a modification of plans in the application of Celia
8 Properties, Limited Partnership.

9 This is for a special exception under
10 Section 2517 to allow a theoretical lot subdivision
11 within 25 feet of a residence. I did read this onto
12 the record this morning. So I'm not going to go
13 completely through it.

14 It was heard September 1991. The Board
15 members at that time were Ms. Bennett, Ms. Jewel,
16 Ms. Pruitt, Mr. Norris and Ms. Thornhill.

17 CHAIRMAN HINTON: Ms. Dobbins?

18 MS. DOBBINS: Yes.

19 CHAIRMAN HINTON: I'm sorry to
20 interrupt, and I thought we did actually approve
21 this this morning, did we not?

22 MS. DOBBINS: No, it was deferred for
23 Ms. Reid to read it at lunch. You took a vote on
24 it, and Ms. Reid indicated that she had not voted.

25 CHAIRMAN HINTON: That's right. Did you
26 have an opportunity to read this at lunch?

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1 MR. CLARENS: We have also been joined
2 by Ms. Richards, who participated in the -- who has
3 read the case.

4 CHAIRMAN HINTON: I'm sorry. You're
5 right. I'm sorry. Please continue.

6 MS. DOBBINS: The vote would not have
7 been a majority vote.

8 CHAIRMAN HINTON: There we go.

9 MS. DOBBINS: So Ms. Reid was to read
10 the record to participate.

11 CHAIRMAN HINTON: Where are we exactly?

12 MS. DOBBINS: This is ready for your
13 action.

14 CHAIRMAN HINTON: Oh, I didn't know if
15 you were going to finish.

16 MS. DOBBINS: Oh, I was not going to
17 read it all over again. I was just indicating that
18 it was before the Board for action at this time.

19 CHAIRMAN HINTON: Very good. Thank you.
20 Do we have a motion? Mr. Clarens?

21 MR. CLARENS: Yes. I move -- In the
22 morning I moved approval. I'm ready to move
23 approval again, but I -- because of my
24 interpretation of what is in front of us, I would
25 like to invite either as a second to the motion -- I
26 would put it back on the floor, but then I would

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1 invite -- For the purpose of the discussion, I would
2 invite Ms. Richards to join us in the discussion, as
3 well as Ms. Reid.

4 CHAIRMAN HINTON: Very good. I second
5 the motion.

6 MS. DOBBINS: And the motion was to
7 approve the waiver and the modification.

8 MR. CLARENS: Yes, the waiver and the
9 modification.

10 CHAIRMAN HINTON: Grant the waiver,
11 approve the modification. Right. You put it so
12 succinctly this morning. Would you like to do that
13 again, Mr. Clarens?

14 MR. CLARENS: Well, yes. In reviewing
15 the application, my interpretation was that -- it
16 was that the uses in question are permitted as a
17 matter of right, and that the only issue before the
18 Board is the number and shape of the subdivisions,
19 of the theoretical lot subdivisions, and that,
20 therefore, we went from 3 to 4 and that the
21 configuration of the lots were different than in the
22 original configuration, and that's how I saw the
23 case.

24 I saw in perhaps too simple a way and,
25 therefore, I saw no issue, no problem with accepting
26 the modification plans. I didn't see any of the

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1 substantive rationales that were given at the
2 original hearing changing.

3 CHAIRMAN HINTON: Okay. Ms. Richards?

4 MS. RICHARDS: I am opposed to the
5 motion, because I think that this is something that
6 needs to be reheard. This project was based on a
7 particular kind of anchor tenant and provisions
8 where the neighborhood was consulted with regard to
9 an overall kind of business plan, and the -- For
10 business reasons, I think the anchor tenant was
11 lost, and we're now going forward with a different
12 proposal.

13 I think that it probably needs to go
14 back to the community to kind of hear their views,
15 rather than deciding this on modifications.

16 MS. REID: I have a problem with
17 modification in a development that has been planned
18 out initially to take 10 years, and it's not
19 uncommon that, as developers get into the actual
20 construction phase, there is sometimes the need for
21 modification so as to make a more efficient project.

22 Therefore, I have no problem to approve
23 the waiver.

24 MS. RICHARDS: If it were a matter of
25 rights development, I would agree, but this is one
26 that did require relief and did require extensive

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1 community consultation, and I remember that kind of
2 as a matter of right that there were some points in
3 controversy about it.

4 Since -- Then it was abandoned, and the
5 site had simply sat vacant and conditions had
6 changed, and I think to simply now sort of go
7 forward and say, oh, okay, you know, now we're going
8 to do it, with a kind of a different set of plans
9 and actors and possibly changed conditions is
10 somewhat precipitous.

11 I think that's why we do have these
12 waiver -- or these kind of time limits in here,
13 because there is a recognition that what was
14 feasible and doable in a particular set of
15 circumstances may not be as time goes on.

16 So I think that -- Then that's kind of a
17 -- That's right at the intersection of Minnesota and
18 Benning Roads, and that's a key site in the Ward 7
19 plan. It's a key site in the -- It's very close to
20 the -- reasonably close to the subway station.

21 I think that, after all of this time,
22 it's just worth revisiting and hearing from all
23 sides, rather than deciding this on a petition for
24 waiver. Those are my concerns.

25 CHAIRMAN HINTON: Ms. Bennett, are you
26 participating?

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1 MS. BENNETT: I am not going to
2 participate in this, no.

3 CHAIRMAN HINTON: Okay. Well, I
4 seconded the motion, and --

5 MR. CLARENS: Let me read you once again
6 very quickly what is in front of us, and that is a
7 variance from Section 2517 -- a special exception,
8 I'm sorry. I guess it's a special exception.
9 That's what it says.

10 2517 -- let me read -- Maybe this is not
11 correct, but 2517 says: Exceptions to building lot
12 control. Mr. Lyons, is that what we're working
13 under? That's what it says in the agenda.

14 MR. LYONS: Yes, Mr. Clarens. What's
15 before the Board is the theoretical lot subdivision.
16 The uses are a matter of right.

17 MR. CLARENS: And the theoretical lot
18 subdivision, the only items that are in front of the
19 Board are the section, two or more principal
20 buildings or structures to be erected as a matter of
21 right on a single subdivided lot that is not located
22 in or within 25 feet of a residence district. The
23 number of principal buildings permitted by this
24 section shall not be limited, provided the applicant
25 for a permit to build made satisfactory evidence
26 that all requirements of this chapter, such as site,

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1 open space around each building, as provided by
2 3202.2 and 3203.3, are met; your principal building
3 has no street frontage as determined by divided and
4 subdivided lot and theoretical building site for
5 each principal building. The following provisions
6 shall apply: The front of the building shall be the
7 side upon which the principal entrance is located;
8 open space in front of the entry shall be provided
9 that is equivalent to the required rear yard in the
10 district in which the building is located; and a
11 rear yard shall be required.

12 So I read that, and I don't find
13 anything there that changes materially.

14 MS. RICHARDS: I will say that the
15 zoning relief, when it was sought in connection with
16 developing a key site, and it didn't go forward, and
17 now that it's going forward several years later, I
18 think it's worth hearing.

19 MS. DOBBINS: Madam Chair, the Board
20 might need to look at the order that was issued in
21 this case. There was a summary order. Nothing in
22 this order, including any of the conditions,
23 affected the use of the property. It only had to do
24 with the site itself.

25 It just says construction shall be as
26 shown on the plans marked as blah-blah-blah;

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1 landscaping shall be -- and it goes on and it
2 discourages truck traffic. There was no opposition
3 to this before. No one appeared in opposition to
4 this proceeding.

5 CHAIRMAN HINTON: And that's consistent
6 with what Mr. Clarens stated earlier this afternoon
7 and also this morning, that the uses of the
8 buildings were not under review. We are looking at
9 the way the lot is subdivided and how many --
10 theoretically subdivided, and how many buildings are
11 located there.

12 MR. CLARENS: And that hasn't changed.
13 What has changed is the lot -- the subdivision of
14 the lots.

15 CHAIRMAN HINTON: Of the theoretical
16 lots.

17 MR. CLARENS: Yes.

18 CHAIRMAN HINTON: All right, and the
19 uses have changed. The uses are all a matter of
20 right, continue to be a matter of right. Right? So
21 thank the staff for reminding us of that.

22 Does that conclude our discussion? Yes.
23 Let me call the question. The motion was to what ?

24 MR. CLARENS: The motion was to approve
25 the request.

26 CHAIRMAN HINTON: Waive? Grant a waiver

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1 of the --

2 MR. CLARENS: And to approve the
3 modification of the plan.

4 CHAIRMAN HINTON: -- and to approve the
5 modification. All those in favor? Opposed? Very
6 good.

7 MR. LYONS: Staff would record the vote
8 as being three to one to approve the waiver and
9 modification of plans; Mr. Clarens, Ms. Hinton, and
10 Ms. Reid to approve; Ms. Richards opposed to the
11 motion; Ms. Bennett not voting, not having reviewed
12 the record.

13 CHAIRMAN HINTON: Let's move to the next
14 case.

15 MS. DOBBINS: The next item, page 6 of
16 the agenda, item D, 16072. This is a request from
17 the applicant dated March 17 and 18, 1997, for
18 reconsideration of the Board's decision in the
19 application of the John Hancock Mutual Life
20 Insurance Company, pursuant to 11 DCMR 3107.2, for a
21 variance from the prohibition against increasing the
22 gross floor area of an existing hotel [Paragraph
23 350.4(d)] in an R-5-B and R-5-D District at premises
24 2660 Woodley Road, N.W. This is Square 2132, Lot
25 32.

26 The hearing dates, December 20, 1995 and

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1 February 21 and March 6, 1996.

2 Decision date: May 1, 1996.

3 The Board deferred the application -- or
4 the request -- Denied, I'm sorry. The Board denied
5 the application by a vote of 3-2 (Ms. Richards, Ms.
6 Hinton and Ms. Bennett to deny; Mr. Clarens and Ms.
7 Reid opposed to the motion.)

8 On April 9, 1997, the Board deferred the
9 matter to allow Ms. Bennett to be present.

10 This reconsideration request is before
11 you for action. There were some ancillary matters
12 associated with this that were brought up prior to -
13 - at the last meeting that need to be addressed
14 before the Board proceeds to deal with this
15 reconsideration.

16 One had to do with the status of Mr.
17 Clarens, and I think we squared that away. There
18 is, for the record, a memorandum from the Office of
19 the Corporation Counsel indicating that Mr. Clarens
20 is appropriately sitting as an acting member of this
21 Board.

22 The second item was an indication that
23 there had been ex parte communications between
24 members of the Board and parties or public officials
25 associated with this case. Based on advice from the
26 Office of Corporation Counsel, it would be

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1 appropriate for any Board or for every Board member
2 to make some determination on the record or indicate
3 on the record whether there has been ex parte
4 communications and how these communications, if
5 there were any communications, would affect their
6 ability to decide this case.

7 CHAIRMAN HINTON: Why don't we do that
8 now?

9 Yes. I have had no ex parte
10 communication with any District officials or parties
11 in the case.

12 MS. REID: I have not had any ex parte
13 communication with any District official or parties
14 in the case.

15 MS. RICHARDS: I would make the same
16 representation.

17 MR. CLARENS: And so would I.

18 MS. BENNETT: I have been contacted by
19 an individual, and at that time I indicated to that
20 individual that I had no problem rendering a
21 decision based on the record of the case and based
22 on the zoning regulations.

23 MS. DOBBINS: This is before the Board
24 at this time for decision.

25 CHAIRMAN HINTON: Thank you. We were
26 handed this afternoon a letter from ANC 3-C -- and I

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1 would like to just take a minute for each of the
2 Board members to be able to read that before we make
3 our decision -- and the decision of Corp. Counsel,
4 right, which Ms. Dobbins has addressed.

5 Do you have it?

6 Well, I'm going to move on. I'm not
7 sure where Ms. Reid has gone, but she'll probably
8 join us. The letter from ANC dated May
9 6 continues to object to the Mayor's appointment or
10 reappointment of Mr. Clarens, and as our Director
11 has stated, the Board has received advice from
12 Corporation Counsel that tells us that the Mayor's
13 appointment is proper and that Mr. Clarens is
14 properly serving on the Board, and the Corporation
15 Counsel is the counsel to the Board and thereby we
16 are going to move forward with their opinion and
17 their position on this matter, as we have been
18 doing; and Mr. Clarens will be sitting on this case,
19 just as he has been on the previous cases for today.

20 Having said that, why don't we move
21 ahead to the substance of the case. This is a
22 request for reconsideration from the applicant, and
23 we've had so many of these today, we ought to know
24 this by hear; but I think that the request for
25 reconsideration has to point out that there was an
26 error made by the Board, and it has to say what that

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1 error is.

2 We can start with a discussion or a
3 motion. I'd like to start with a motion. So let me
4 see if I have one of those. Anybody?

5 MR. CLARENS; I would move approval on
6 the request for reconsideration of the Board's
7 decision.

8 MS. REID: I would second it.

9 CHAIRMAN HINTON: It is properly moved
10 and seconded. Would you like to put your reasoning
11 on the record?

12 MR. CLARENS; Yes. I think that we all
13 know what this case is about, and I think that
14 everybody is quite familiar with the situation.
15 This is a case that I've been waiting for a
16 significant amount of time to be able to say a
17 couple of things about how the Board acted, because
18 I was appalled at the way that the Board came to its
19 conclusion at the end of our hearing in which we
20 made the decision.

21 It took a while, and I read carefully
22 the transcript of the hearing in that case, and it's
23 so clear to me that I'm -- that all the arguments,
24 as it was made very clear by the counsel for the
25 applicant, were made and that different Board
26 members at different stages during the discussion on

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1 this hearing concur that, in fact, we were dealing
2 with a variance case, and that a variance case was
3 of a variance from paragraph 350.4, which prohibits
4 increasing the gross floor area of existing hotels
5 in residential districts, but the word that is used
6 in prohibiting is the word may, which in English
7 means that -- It doesn't mean shall.

8 So that if the Zoning Commission in
9 writing the regulations did not want any expansion
10 of a hotel, they should have said the hotels shall
11 not increase their size. The fact that they used
12 the word may means that, in fact, there might be
13 occasions where expansion could be, in fact,
14 considered.

15 We went through then the burden of proof
16 fairly carefully in my recollection of first
17 establishing uniqueness, and at several points
18 during the hearing -- many members on this Board who
19 are sitting here today concur that this property is
20 a unique property that has unique characteristics,
21 both in terms of size, configuration, topography,
22 history, and the character and size of the buildings
23 that occupy it.

24 We then went to talk to great extent
25 about the difficulties and the nexus that exists
26 between this uniqueness to the property and the

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1 difficulty to perform the functions of a hotel of
2 this size, and with the particulars associated with
3 that view in this, and there was ample testimony in
4 the case that, in my mind, supported the arguments
5 of the applicant that the configuration that exists
6 does not satisfy or impair the proper functioning of
7 the hotel use as current industry standards demand.

8 In several points along the line,
9 several members -- a majority of Board members
10 concur that that nexus existed. We then went on to
11 discuss adverse impact to the community, and we had
12 a long discussion about this.

13 Again, both in the request for
14 reconsideration and in reading the transcript, a
15 majority of Board members concur that, actually, the
16 plan proposed ameliorated adverse impact that the
17 hotel might have on the community at present.

18 Finally, we came to the issue of adverse
19 impact, which we also discussed to great extent. We
20 went into a great discussion about whether it was
21 the intention to prohibit any expansion or to
22 prohibit an expansion that began to encroach further
23 on residential areas.

24 We went to a great extent to discuss
25 these issues, and once again, as presented by the
26 counsel for the applicant, the majority of Board

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1 members concurred that, in our interpretation of the
2 regulation -- and you began this presentation or
3 this argument by telling the word use is may and not
4 shall. So it means that, in fact, expansion was
5 considered as a possibility if the burden of proof
6 was met.

7 So having made all that argument of
8 which I participated rather actively, you know, with
9 all of you, then much to my surprise, after all this
10 argument, oh, everybody is concurring, a vote is
11 taken, and the vote ends up being a negative vote.

12 That floored me completely, and still,
13 because I saw no nexus between the arguments that
14 had been made, the decisions that had been taken
15 publicly on the case by Board members, and the
16 conclusions that they had reached.

17 Further, aggravation has come as a
18 result of the fact that I was never given until it
19 was issued a copy of the order for review. A copy
20 of the order was never -- I never got a chance to
21 review it, maybe because I am in the opposing side;
22 but there is no concurrence between the order and
23 the arguments made.

24 The arguments made in the order are not
25 supported by the discussions of the Board at the
26 time of the meeting in which the decision was made.

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1 And I will stop there.

2 CHAIRMAN HINTON: I guess I need to
3 start with this. There's a saying that I've heard
4 from time to time that says people hear what they
5 want to hear, and there is not a clearer case in
6 point than this case in front of me; because I have
7 read in the applicant's statement about my own
8 opinions, and it is amazing to me how I can say
9 something, and it can be interpreted a different
10 way.

11 I guess, if I can summarize the way I
12 see this request for reconsideration that's been
13 presented to the Board, is that the applicant
14 believes that the decision is not reflected in the
15 discussion, and that somehow the Board members
16 didn't understand what it was that they were voting
17 on.

18 Now you find the discussion and the
19 result to be incredible. I find it to be even more
20 incredible that people think that we discuss
21 something and then have no idea what it is we're
22 voting on.

23 I think it's probably more likely that,
24 in difficult and complicated cases, during the
25 Board's discussion that we say a lot of things, and
26 a lot of times in cases things are not crystal clear

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1 and they are not black and white, and I think that's
2 the reason that we have a discussion, is that we
3 hear the testimony, we read the record, but then we
4 come together as, hopefully, five people, sometimes
5 four or three, and we get to talk to each other
6 about how we see it, what we heard and what we think
7 is important and how we think we need to decide.

8 I think what happened in this case is we
9 talk a lot, and maybe we talk too much, and maybe
10 I'm talking too much now; but, you know, I think we
11 said a number of things, but our conclusion is very
12 clear. I think the written order is very clear.

13 The Board members who voted to deny the
14 application reviewed the written order many, many
15 times before it was issued. We reviewed every
16 single word. We reviewed the tape of the hearing.
17 We reviewed the written transcript of the hearing.
18 We went through the decision process, issue by issue
19 and item by item, to be sure that the conclusions
20 that we felt we had come to in our decision and our
21 discussion were reflected in the written decision.

22 So for an applicant to come forward and
23 say, hey, you didn't write what you said or you
24 didn't vote what you meant or you didn't whatever, I
25 think, is pretty ridiculous. I think the written
26 decision is very clear. I think it reflects the

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1 decision of the Board.

2 As a matter of fact, I think it's kind
3 of amazing that the request for reconsideration
4 barely makes reference to the written decision,
5 which is the decision of the Board.

6 So that's what I'm going to say.

7 MS. RICHARDS: I will take to heart your
8 admonition that maybe we talk too much, and say only
9 that I don't think the motion meets the requirements
10 for reconsideration and that it simply asks for a
11 re-weighing of the evidence; and although sometimes
12 evidence may be so poorly weighed that the decisions
13 reached thereon amount to clear error, I think that
14 the weighing here was well within the judgment and
15 discretion that there is no error warranting
16 revisiting.

17 CHAIRMAN HINTON: Very good. Ms.
18 Bennett and Ms. Reid.

19 MS. BENNETT: I think, Madam Chair, you
20 have expressed my sentiments exactly, and I will
21 leave it at that until you call the question.

22 MS. REID: I, too, thought that the
23 Board erred. I felt that there were some issues
24 that were not really taken up as seriously as they
25 may have been with regard to -- there was some
26 discussion about uniqueness, and there was a

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1 question that came up, whether or not it was unique.

2 The first test, whether or not the
3 property was unique or not, I definitely think that
4 the topography and the site as well as the irregular
5 shape -- Especially in comparison to some of the
6 other hotels, in particular, in the neighborhood
7 itself, the property would definitely have to be
8 considered unique, in fairness.

9 Then look at the hardship question.
10 When the facilities -- the layout of the facility
11 has now rendered it almost obsolete. The building
12 itself suffers from functional obsolescence.

13 If we are to try to represent the city,
14 then we have just numerous organizations and
15 associations and groups who are begging for more
16 space to have their commissions come to the city,
17 and I think that, as the nation's capital, we should
18 be mindful of the fact that sometimes things are
19 more important than looking at the smallest picture,
20 to look at the larger picture, and not throw the
21 baby out with the bath water; because I feel that,
22 as far as adverse impact was concerned, the
23 applicant did reach out to try to alleviate greatly
24 the problem that they're having there now with
25 regard to parking, in regard to the traffic, of the
26 space that was requested.

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1 The lion's share of it, 85,000-some-odd
2 square feet, was for parking. That parking is
3 greatly needed in that community. I'm very familiar
4 with the community. It's greatly needed. Another
5 large share was the covered loading dock to prevent
6 -- or to try to ameliorate some of the noise factor,
7 and much of the spaces they were requesting was
8 exterior, and the total amount of the request was --
9 I think it's something like less than three percent
10 increase.

11 CHAIRMAN HINTON: I hate to interrupt,
12 but we need to keep our comments off of the
13 substance, because we are not re-arguing the case.
14 We are simply talking about the applicant's request
15 to reconsider based on their --

16 MS. REID: Okay. Well --

17 CHAIRMAN HINTON: -- feeling that the
18 decision doesn't represent what the Board decided.

19 MS. REID: Well, there was another issue
20 that came up that I wasn't quite clear on, and that
21 was in a statement from Ms. Richards regarding
22 greater scrutiny that had come up in the applicant
23 letter, when she talks about -- a higher level
24 scrutiny in the application of the regulations in
25 this instance. I didn't understand that. That was
26 one of the error parts.

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1 That was one of the things that was
2 raised, and I, too, didn't understand it.

3 MS. RICHARDS: That particular
4 regulation limits a certain class of hotel uses in a
5 particular way. It's not -- They are not just
6 subject to regular -- that says you may expand, you
7 may renovate, repair, etcetera. That's the
8 additional limitation, and it is the additional
9 limitation that creates the heightened scrutiny to
10 see if a particular expansion in a given case meets
11 that kind of narrow area of permissible activity.

12 So that's what I meant at the time. I
13 certainly would like for my discussion remarks to be
14 considered as merged in the decision.

15 MR. CLARENS: So, Madam Chairperson, you
16 mean to tell me that the three members that voted
17 for this order which I have just reread as Ms. Reid
18 was talking support this order. You all feel that
19 this order really reflects your feeling.

20 By the way, the Board -- The entire
21 Board did not review the order. The members that
22 voted in favor of the order reviewed the order.
23 This is your order. It is not my order.

24 You mean to tell me that -- and there's
25 nothing that we can say and there's nothing the
26 applicant can say to make you reconsider that

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1 decision? You read this order, and you truly feel
2 that this order really represents your understanding
3 of what you heard in the case?

4 MS. RICHARDS: Mr. Clarens, not only did
5 I read this order, but with the drafts of the
6 parties in hand and with input from Ms. Bennett and
7 Ms. Hinton I wrote part of this order, and we all
8 reviewed it extensively, and I think it is legally
9 sound. In fact, I think that it is quite generous.

10 We went over the law and the drafting,
11 and I thought, you know, if I were going to kind of
12 like revisit my thoughts which, as I pointed out
13 earlier, I would not arbitrarily do, I think, if
14 anything, that the argument for this being a use
15 variance became stronger in my mind; but, of course,
16 I did not raise that.

17 CHAIRMAN HINTON: Let's not go into
18 substance.

19 MS. RICHARDS: I'm just pointing out --
20 I'm answering his question as to whether or not I
21 believe this order adequately reflects my views, and
22 I'm going to great length so that he will know the
23 extent to which it does. It was offered for those
24 purposes of supporting this document, not to reopen
25 the substantive issues.

26 CHAIRMAN HINTON: My only answer to you

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1 is I spent more time reviewing this order and this
2 case than any other case that I've ever been on, and
3 to that extent, this written order reflects exactly
4 my feeling, exactly the way I see the evidence
5 summed up.

6 So is there anything they can say? I
7 don't know. I'm not even going to answer that.
8 They haven't said anything so far.

9 MS. BENNETT: I am ready for the
10 question.

11 CHAIRMAN HINTON: You're ready? Okay.
12 Now the motion that's on the table is a motion to
13 grant. Right? Just so we're clear. All those in
14 favor? Opposed? That motion fails. Do we have
15 another motion, anybody?

16 MS. RICHARDS: I'll move to adopt the
17 order issued by the Board.

18 MS. DOBBINS: No, you would move to deny
19 the reconsideration request.

20 CHAIRMAN HINTON: I'll move to deny the
21 request for reconsideration.

22 MS. RICHARDS: Second.

23 CHAIRMAN HINTON: All those in favor?
24 Opposed? Could we record the vote?

25 MR. LYONS: Staff would record the vote
26 as being 3 to 2, I believe. Ms. Hinton, Ms.

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1 Richards, and Ms. Bennett to deny; Ms. Reid and Mr.
2 Clarens opposed to the motion.

3 CHAIRMAN HINTON: Thank you. Do we have
4 any other cases on our agenda?

5 MS. DOBBINS: You have correspondence
6 under other matters in the application of 15129 or
7 the appeal.

8 You have a letter from Laurence Aurbach
9 requesting that the Board dismiss the Woodland
10 Normanstone Neighborhood Association from the Appeal
11 -- from Appeal No. 16129 of Richard Nettler on
12 behalf of the Woodland Normanstone Neighborhood
13 Association.

14 This was before you last month, and the
15 Board requested that the staff write Mr. Aurbach to
16 ensure that he was representing the Woodland
17 Normanstone Neighborhood Association, and you do
18 have a letter in your packet from Mr. Aurbach, and
19 you also have a letter from ANC 3-C under the
20 signature of Mr. Mittleson regarding this
21 application or this request.

22 I'm not going to go through and read
23 all of this, but this is just their request to be
24 dismissed from the appeal.

25 CHAIRMAN HINTON: The neighborhood
26 association is requesting to be dismissed from the

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1 appeal. The ANC apparently wishes to continue with
2 the appeal and asks the BZA to schedule those as
3 soon as possible.

4 MS. DOBBINS: That's right. You have a
5 remand. So --

6 CHAIRMAN HINTON: We have a remand, and
7 we've had it for a while. So we probably need to
8 schedule this.

9 MS. DOBBINS: You need to schedule it.

10 CHAIRMAN HINTON: As far as the
11 neighborhood association's request, I think that we
12 should grant it. I think that we cannot force any
13 party to continue to participate in proceedings that
14 they are not interested in.

15 We have a letter from the ANC that tells
16 us that the appeals will continue. They are still
17 interested and, therefore, the appeals will continue
18 to go forward.

19 I don't believe there's anything else we
20 can reasonably do. So I would make a motion to
21 grant the request to dismiss Woodland Normanstone
22 from the appeals. Anyone want to second that?

23 MS. RICHARDS: Second.

24 CHAIRMAN HINTON: All those in favor?
25 Opposed? You voting? You did vote aye? I made the
26 motion.

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1 MR. CLARENS: And Ms. Richards seconded,
2 and we all voted in favor.

3 MS. RICHARDS: Madam Chairperson, do you
4 contemplate that this will be sent down for a
5 hearing on remand by the remaining party?

6 CHAIRMAN HINTON: Yes, absolutely.
7 Could we have the vote recorded?

8 MS. DOBBINS: Yes, record the vote,
9 please, Mr. Lyons.

10 MR. LYONS: Staff would record the vote
11 as being 5-0 to grant the request of the Woodland
12 Normanstone Association; Ms. Hinton, Ms. Richards,
13 Ms. Reid, Mr. Clarens, and Ms. Bennett to grant.

14 I thought we gave you the record.

15 MS. DOBBINS: This record was given out
16 a long time ago, quite a while ago when it came back
17 from the court. No? Then we need to amend the
18 vote.

19 MR. LYONS: The vote then would stand as
20 4-0 with Ms. Hinton, Ms. Richards, Mr. Clarens and
21 Ms. Bennett to approve; Ms. Reid not voting, not
22 having participated, not having reviewed the record.

23 CHAIRMAN HINTON: When can we schedule
24 these appeals?

25 MS. DOBBINS: Can we put this on the
26 Board's special public meeting agenda for the 28th

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1 for the Board to review the remands to make some
2 determination? You've already had the record in
3 this case, and I think you probably want to pull it
4 out again, and we'll put it on the agenda for May
5 28th for you to answer the remand from the court.

6 CHAIRMAN HINTON: Very good. So at that
7 time we would consider whether we need a rehearing
8 or new information. Right?

9 MS. DOBBINS: Yes. What you would be
10 doing is looking at the reason that it was remanded
11 to you by the court, reviewing the record. You're
12 going to probably have to look at it again, since
13 you got it so long ago, to make some determination
14 about what your course of action would be.

15 If you can proceed, you can proceed at
16 that time. If not, then you'll make some
17 determination about how else to proceed.

18 CHAIRMAN HINTON: That's good. We were
19 going to start that meeting at two o'clock. Is that
20 right?

21 MS. DOBBINS: Yes.

22 CHAIRMAN HINTON: So we think there's
23 still time in the afternoon?

24 MS. DOBBINS: You only have the one item
25 before that. Depending on how much time you want to
26 spend at two, starting at two, there is also one

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1 other item that you deferred today that probably
2 needs to be on that agenda, and that is Joseph's
3 House, and that's because we still run the same risk
4 of exceptions process if we don't get an order out
5 in a reasonable period of time.

6 CHAIRMAN HINTON: Good. Let's schedule
7 that also, and the appeal. So now we have four
8 cases on that agenda?

9 MS. DOBBINS: Yes. The two appeals on
10 the same issue, and two applications.

11 CHAIRMAN HINTON: Very good. Adjourned.
12 (Whereupon, the foregoing matter went
13 off the record at 5:03 p.m.)
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